

LAW OFFICES

KELLER AND HECKMAN

1001 G STREET, N.W.
SUITE 500 WEST
WASHINGTON, D.C. 20001
TELEPHONE (202) 434-4100
TELEX 40 95551 "KELMAN"
TELECOPIER (202) 434-4646

BOULEVARD LOUIS SCHMIDT 87
B-1040 BRUSSELS
TELEPHONE 32(2) 732 52 80
TELECOPIER 32(2) 732 53 92

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CHARLES V. BREDER, PH. D.
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JOHN P. MODDERMAN, PH. D.
HOLLY HUTMIRE FOLEY
JUSTIN C. POWELL, PH. D.
JANETTE HOUK, PH. D.
LESTER BORODINSKY, PH. D.

TELECOMMUNICATIONS
ENGINEER
CHARLES F. TURNER

WRITER'S DIRECT DIAL NUMBER
(202) 434-4210

September 2, 1994

EX PARTE OR LATE FILED

EX PARTE NOTICE

VIA HAND DELIVERY

William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: CS Docket No. 94-48
Cable Competition Report
Ex Parte Notice

Dear Mr. Caton:

On August 19, 1994, the United States Satellite Broadcasting Company, Inc. ("USSB") submitted a "Supplement to Consolidated Comments and Reply Comments in the Cable Competition Proceeding" ("Supplement") in connection with the Commission's Report to Congress on the "Status of Competition in the Market for Delivery of Video Programming." (CS Docket No. 94-48). The National Rural Telecommunications Cooperative ("NRTC"), by its attorneys, hereby submits this response to USSB's Supplement.^{1/}

Rather than addressing substantive issues, the USSB Supplement represents yet another personalized, unfounded attack on the credibility and integrity of NRTC, its

^{1/} Pursuant to Section 1.1206 of the Commission's rules, two copies of this letter are provided for inclusion in the public record of this proceeding.

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Members and Affiliates.^{2/} Although NRTC will not respond to each of the multitude of allegations made by USSB, a sampling of USSB's accusations are addressed below.^{3/}

**Members and Affiliates of NRTC Have a Right to
Submit Comments to the Commission.**

Apparently, believing that it should have a monopoly not only on programming, but on the submission of Comments to the Commission, USSB objects vehemently to what it characterizes (five times on one page) as NRTC's "letter writing campaign." (Supplement, p.3). USSB argues that more than 100 comments submitted in this proceeding by Members and Affiliates of NRTC should be summarily dismissed by the Commission, because NRTC "urged its member cooperatives and affiliates throughout the country to send letters to the FCC and Capitol Hill on the topic of Program Access and USSB's exclusive programming agreements by the 'deadline' of July 29, the date by which Reply Comments were due to be filed in this proceeding." (Supplement, p. 2). To this charge, NRTC pleads guilty.

More than 100 Members and Affiliates of NRTC in fact wrote to the Commission at NRTC's urging and expressed their own concerns regarding their inability to distribute Time Warner and Viacom programming (i.e., Cinemax, Flix, HBO, The Movie Channel, Showtime, Comedy Central, MTV, VH-1 and Nickelodeon) through NRTC and DirecTv.^{4/} Each letter describes the local, "real world" impact of the USSB/Time

^{2/} See, for instance, USSB Reply Comments, CS Docket No. 94-48, pp. 15-16; USSB's "Ex Parte Response to Ex Parte Presentation by the National Rural Telecommunications Cooperative ("NRTC"); MM Docket No. 92-265, January 24 and February 3, 1994. Cf., Second Ex Parte Presentation by NRTC, MM Docket No. 92-265, March 4, 1994.

^{3/} NRTC does stand corrected on one point. At the time NRTC filed its Comments in this proceeding, NRTC believed that Viacom had authorized Primestar to deliver Viacom's programming. Viacom has now stated in the record of this proceeding that it has not authorized Primestar's distribution of its programming. (Viacom Reply Comments, pp. 2-3). We apologize for our confusion.

^{4/} A list of Members and Affiliates of NRTC who have written to the Commission is attached hereto as Appendix A.

Warner/Viacom exclusivity deal on the development of Direct Broadcast Satellite (DBS) and the provision of competitive video programming.^{5/}

USSB claims, however, that all of these letters should be rejected by the Commission because they were somehow improperly manufactured by NRTC and are not based on "any real life experience of the NRTC affiliates and cooperatives." (Supplement, p. 3). In sum, according to USSB, more than 100 electric utility cooperatives, independent telephone companies, telephone cooperatives and affiliates of NRTC essentially misrepresented their status when they wrote and complained to the Commission that they are unable to compete effectively in the local video distribution marketplace because of their lack of access to programming owned by Time Warner and Viacom. Id.

There is no credible evidence submitted by USSB to support such an outrageous charge, and it is untrue. NRTC's Members and Affiliates are operating local DBS businesses throughout the country. They have invested more than \$100,000,000 in this project. They have every right to correspond with the Commission and Congressional representatives and to seek a regulatory/legislative solution to a Program Access problem they encounter every day. USSB's attempt to block their access to the Commission, like USSB has blocked their access to programming, is inappropriate and should be rejected by the Commission.

The USSB/Time Warner/Viacom Exclusivity Arrangement Creates a Programming Bottleneck.

The USSB/Time Warner/Viacom deal severely restricts consumer choice by forcing DBS consumers and distributors to purchase Time Warner and Viacom programming only through USSB. Instead of multiple distributors competing vigorously to provide a diversity of service offerings to DBS consumers, as envisioned by Congress in the Cable Act, the USSB/Time Warner/Viacom exclusivity arrangement allows the two major vertically-integrated programmers to make USSB "the only show in town" for DBS distribution of Time Warner and Viacom programming.

USSB attempts to discount any competitive problems as a result of its exclusive programming arrangement, saying that it has implemented an "open retail policy." (Supplement, pp. 5-6). USSB's "open retail policy," however, is nothing more than a

^{5/} Time Warner and Viacom granted to USSB the exclusive right to distribute their programming from the DBS 101° orbital location, in violation of the Program Access provisions of the 1992 Cable Act. Section 548(c)(2)(C) of the Cable Act specifically prohibits exclusive arrangements ("including" but not limited to those involving cable operators) in areas unserved by cable. 47 U.S.C. 548(c)(2)(C).

requirement that all consumers or distributors of Time Warner and Viacom programming deal directly or indirectly through USSB. This is not "open entry." To the contrary, it is a programming bottleneck.^{6/}

As a multichannel video programming distributor, NRTC has a statutory right to deal directly with vertically-integrated cable programmers, such as Time Warner and Viacom, for distribution of programming to persons in areas unserved by cable. 47 U.S.C. 548(c)(2)(C). NRTC is not obliged, under the law, to become a designated "sales agent" of USSB.

**Exclusive Arrangements with Vertically-Integrated Programmers
are Prohibited by the Cable Act in Areas Unserved by Cable.**

The Cable Act's broad prohibitions against exclusive contracts are based on the cable industry's long and inglorious history of using them for anticompetitive purposes. Congress determined to rectify this problem so that vertically-integrated cable programmers could no longer manipulate the emergence of potential cable competitors by tying-up programming in exclusive contracts. The Program Access provisions are designed to ensure that all multichannel video programming distributors (not just those, like USSB, that are chosen by the cable industry) have full and fair access to cable programming controlled by vertically-integrated cable companies. 47 U.S.C. 548(c)(2)(C).

The Cable Act prohibits vertically-integrated cable programmers such as Time Warner and Viacom from entering into exclusive contracts or engaging in any other practices, activities, arrangements or understandings that would prevent a cable competitor from obtaining access to their programming for distribution to persons in areas not served by cable.^{7/} 47 U.S.C. 548(c)(2)(C). USSB's exclusive arrangements with Time Warner and Viacom unfairly and illegally block NRTC, its Members and Affiliates from obtaining programming that the Cable Act ensures they have a right to obtain.

^{6/} Within the context of telecommunications, USSB's role is analogous to re-divestiture AT&T, with only one service provider controlling access to the long distance (or, in this case, programming) market. This hardly represents "open" access.

^{7/} USSB attempts to confuse this issue by claiming that DirecTv also has obtained exclusive programming contracts. (Supplement, p. 4). Not all exclusive contracts, however, are prohibited by the Cable Act. To NRTC's knowledge, DirecTv has entered into no exclusive contracts with vertically-integrated cable programmers which, like those involving USSB, are prohibited by the Cable Act. 47 U.S.C. 548(c)(2)(C).

The USSB/Time Warner/Viacom deal creates the most severe competitive problem facing the satellite delivered programming industry.^{8/} It allows the vertically-integrated cable industry to control DBS as a competitive technology. It artificially restricts consumer choice and reduces competition. Consumers will be required to piece together program offerings of multiple DBS operators. DirecTv and NRTC will be checkmated, because they will lack direct access to critical programming. Consumers, ultimately, will pay the price in inconvenience and higher retail rates.^{9/}

As a result of the exclusivity granted to USSB by the vertically-integrated programmers, a full, competitive menu of programming is unavailable to NRTC, its Members and Affiliates for distribution over DBS to persons in areas unserved by cable. This type of exclusivity is contrary to the letter and spirit of the Program Access provisions of the Cable Act (47 U.S.C. 548(c)(2)(C)) and should be specifically prohibited by the Commission's rules (47 C.F.R. 76.1002(c)(1)).

The letters of NRTC's Members and Affiliates confirm the scope of the problems created by the USSB/Time Warner/Viacom deal. They provide important local, "real world" evidence of the cable industry's abusive contracting practices. They should be fully considered and relied upon by the Commission, not rejected out of hand as USSB requests.

^{8/} This issue is the subject of NRTC's pending Petition for Reconsideration in Docket No. 92-265 (Program Access Proceeding). In its Notice in the Cable Competition Report proceeding, the Commission recognized that resolution of this and other issues could affect the state of competition in the multichannel marketplace. Notice, para. 11. The Commission stated, however, that it did not intend to "consolidate" these and other pending issues within the present inquiry. *Id.* NRTC pointed out however, that to be effective the Commission's assessment of the status of competition in the delivery of video programming must include a full analysis of the scope of the Commission's ban against exclusive arrangements by large, vertically-integrated programmers. Without consideration of this critical issue, the Commission's analysis and resulting report to Congress will be grossly incomplete. *See*, NRTC Comments, CS Docket No. 94-48, Note 16. None of this renders NRTC's pleadings or the comments of its Members and Affiliates somehow "improper," as USSB claims.

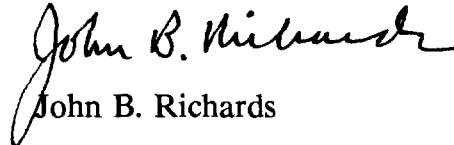
^{9/} As mentioned in NRTC's Comments, for instance, USSB's DBS retail rate for HBO already exceeds by a wide margin the C-Band retail rate for HBO. (NRTC Comments, Note 31).

William F. Caton
September 2, 1994
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KELLER AND HECKMAN

Should you require any additional information, please feel free to contact the undersigned. Your attention to this matter is appreciated.

Sincerely,



John B. Richards

Attachment

cc: The Honorable Reed E. Hundt, Chairman
The Honorable James H. Quello
The Honorable Andrew C. Barrett
The Honorable Rachelle B. Chong
The Honorable Susan Ness
William E. Kennard
James Olson
Meredith Jones
William H. Johnson
Diane L. Hofbauer
Amy Zoslov
Nina M. Sandman
Jerry Duvall
Jonathan D. Levy

**Commenters in Support
of NRTC's Petition for Reconsideration**

**Program Access Proceeding
MM Docket No. 92-265**

ADAMS-COLUMBIA ELECTRIC COOPERATIVE
ADVANCED TEL-COM SYSTEMS CORPORATION
ALLAMAKEE-CLAYTON ELECTRIC COOPERATIVE, INC.
ARGOS
ASSOCIATION OF ILLINOIS ELECTRIC COOPERATIVES
BALDWIN COUNTY ELECTRIC MEMBERSHIP CORPORATION
BLOCKER ELECTRONICS
BLUEBONNET ELECTRIC COOPERATIVE, INC.
BOONE ELECTRIC SATELLITE SYSTEMS, INC.
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CASCO COMMUNICATIONS
CEDAR VISION, INC.
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CLARK ELECTRIC COOP
CLARKS TELEPHONE COMPANY
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